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No. 06-472

In The

Supreme Court of the United States

ALEXANDER BERGMAN, *et al.*,

Petitioners,

v.

STATE OF KANSAS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Kansas Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN S. ROBB
SOMERS, ROBB & ROBB
110 E. Broadway
P.O. Box 544
Newton, Kansas 67114
(316) 283-4560

ALAN L. RUPE
Counsel of Record
KUTAK ROCK LLP
8301 E. 21st St. N.
Suite 370
Wichita, Kansas 67206
(316) 609-7900

Attorneys for Respondents (Plaintiffs Below)

CUCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. QUESTION PRESENTED

Do Petitioners, who were not parties to the litigation below, have standing to assert federal constitutional claims that were neither raised, litigated, nor decided by the Kansas Supreme Court?

II. PARTIES TO THE PROCEEDING

Petitioners are Kansas school children attending public school in Unified School District No. 512 (Shawnee Mission) and Unified School District No. 229 (Blue Valley), and their parents: Alexander, Katherine, William, James, Brad, and Libby Bergman; Patrick, Doug, Bob, and Debbie Dellinger; Madison, Breanna, and Carol Rowe; Connor, Cameron, and Ann Carollo; Syndey, Wyatt, and Kim Edmisten; Sarah, Nathan, and Dan Goldman; Abigail, Parker, and Bonnie Heying; Connor, Kylie, Courtney, and Tracy Rellihan; Ben and Mary McBride; Graham and Noah Eidemiller; Janice Langholz; Peter, Robby, Joseph, and Judy Moriarty; A.J., Will, Maureen, and Trish Orth; Joe, Sydney, and Mary Bahr; Maxwell, Emma, and Christine Braasch; Chase and Susan Schaible Ainsworth; William, Harrison, and Brian Short; Helen, Anna, and Mary Petrow; Johnnie, Danielle, Alexandria, and Julie Norton; Morris, Charles, Ronald, and Barbara Bronstein; Lauren, Erik, Janis, and Christian Hansen; Ryan, Michael, Daniel, Greg, and Laurie Widrig; Lucy, Mary, and Dan Bush; Jonathon, Jefferson, Caroline, Brad, and Rebecca Adams; Andrew, Alexandra, Katie, Steve, and Lori Dykeman; Taylor, Zachary, Donna, and Jim Wilson; Jason, Michael, Michelle, and James Hoffman; Kristin, Eric, Mary, and Dave Larson; Grace, John, and Aymi Foley; Max, Reilly, Brad, and Michelle Agadoni; John Tyler; Megan, Caroline, Susan, and Mark Koenig; Addison, Jillian, and Michelle Schlatter; Hannah, Max, Janice, and Jeff Pinson; Emma, Cameron, David, and Susan Keefer; John, Paige, Kathryn, and Jim Dussold; Brenan Patrick; Conner James, Dillon Thomas, Linda, and Timothy Cavanaugh; Tyler, Andre, Ahmet, and Lori Kodanaz;

II. PARTIES TO THE PROCEEDING – Continued

Justin, Alexandra, Reid, Rhonda, and Patrick Johnston; Mark, John, Steven, Jennifer, Steve, and Jody Bolton; Blake, Erin, Benjamin, Phil, and Mary Hylton; Bradley, Leslie, Doug, and Shea Dixon; Spencer, Kendra, Betsy, and Tommy Avenia; Trent, Gardner, and Sheryl Wright; Morgan, Elizabeth, Lynne, and Gerald Matile; Marissa, Hayley, Stacey, and Howard Wizig; and John, Joseph, William, and Anne Blessing.

Respondents are as follows:

Plaintiffs Below: Unified School District No. 443 (Dodge City), Unified School District No. 305 (Salina), and students attending school in these two districts, by and through their parents and/or next friends. Those students are Ryan Montoy; Lajuan and Mytesha Robinson; Sierra and Seth Gwin; Rene Bess; Keely Boyce; Cruz Cedillo; Lynette Do; Christopher and Monique Harding; Joseph Hawkinson; Jennie Nguyen; Sandy, Nicole, and Bruce Thu Pham; Andrea Bethke; Damian and Dylan Arredondo; Eduardo Dominguez; Chris Freeman; Monica Garcia; William Zachary Harrison; Robert Hindman; Alex Jake; Yadira Moreno; Manuel Solorzano; Benjamin Vicente; Brittany Ash-Clark; Jin Jeon; Jacob Stack; Bronson Waite; Jacob Lemaster; Nicholas Woodfield Brooke; Blaine Smith; Jerry Dix; Tanner Robidou; and Justin Hostetter.

II. PARTIES TO THE PROCEEDING – Continued

Defendants Below: The State of Kansas;[1] Connie Morris (in her official capacity as a member of the Kansas State Board of Education); Janet Waugh (in her official capacity as a member of the Kansas State Board of Education); Sue Gamble (in her official capacity as a member of the Kansas State Board of Education); John W. Bacon (in his official capacity as a member of the Kansas State Board of Education); Bill Wagnon (in his official capacity as a member of the Kansas State Board of Education); Kathy Martin (in her official capacity as a member of the Kansas State Board of Education); Ken Willard (in his official capacity as a member of the Kansas State Board of Education); Carol Rupe (in her official capacity as a member of the Kansas State Board of Education); Iris Van Meter (in her official capacity as a member of the Kansas State Board of Education); Steve E. Abrams (in his official capacity as a member of the Kansas State Board of Education); and Bob L. Corkins (in his official capacity as Commissioner of Education for the State of Kansas).

[1] Petitioner improperly identifies "the Attorney General of the State of Kansas" and "the Kansas State Board of Education" as Respondents. Neither was a party to the litigation below.

III. CORPORATE DISCLOSURE STATEMENT

None of the Respondents (Plaintiffs Below) are a corporation that has issued shares to the public, nor are any a parent corporation, a subsidiary or affiliate of corporations that have done so.

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VI. OPINIONS AND ORDERS BELOW

The Kansas Supreme Court's opinion reversing the Shawnee County District Court's *sua sponte* dismissal of Plaintiffs' claims is reported at *Montoy v. State of Kansas*, 62 P.3d 228 (Kan. 2003) ("***Montoy I***"). The Memorandum Opinion and Preliminary Interim Order of the Shawnee County (Kansas) District Court is not reported in any official reporter. See, *Montoy v. State of Kansas*, Case No. 99 c 1738, 2003 WL 22902963 (Shawnee Cnty. Dist. Ct., Dec. 2, 2003). The Kansas Supreme Court's opinion affirming in part and reversing in part the decision of the Shawnee County District Court is reported at *Montoy v. State of Kansas*, 102 P.3d 1160, opinion supplemented, 120 P.3d 306 (Kan. 2005) ("***Montoy II***"). On that same day, January 3, 2005, the Kansas Supreme Court denied a motion to intervene by an organization called Kansans for Separation of School and State. That decision is reported at *Montoy v. State of Kansas*, 102 P.3d 1158 (Kan. 2005) ("***Montoy II½***"). The Kansas Supreme Court's June 3, 2005 opinion is reported at *Montoy v. State of Kansas*, 112 P.3d 923 (Kan. 2005) ("***Montoy III***"). The Kansas Supreme Court's July 8, 2005 opinion and order dated July 8, 2005 is not reported in any official reporter. ("***Montoy IV***"). The Kansas Supreme Court's order denying Petitioners' Motion to Intervene is not reported in any official reporter. The Kansas Supreme Court's order dismissing the litigation below is reported at *Montoy v. State of Kansas*, 138 P.3d 755 (Kan. 2006) ("***Montoy V***").

VII. JURISDICTION

Petitioners assert jurisdiction pursuant to 28 U.S.C. § 1257(a). Respondents dispute this assertion and contend there is no jurisdiction over Petitioners' claims because (1)

Petitioners were not parties to the litigation below and (2) there were no federal statutory or constitutional claims raised or decided in the litigation below.

VIII. CONSTITUTIONAL AND STATUTORY PROVISIONS

1. 28 U.S.C. § 1257(a) provides, "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

2. KAN. CONST., art. VI, § 6 provides, in relevant part, "The legislature shall make suitable provision for the finance of the public educational interests of the state. . . ."

IX. STATEMENT OF THE CASE

Respondents, the plaintiffs below,[2] first brought suit against the State of Kansas in the United States District Court for the District of Kansas alleging that the State's scheme for funding public education discriminated against the plaintiffs on the basis of race, ethnicity, national origin, and disability. *See, e.g., Robinson v. State of Kansas*, 295 F.3d 1183 (10th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003). Respondents specifically alleged Equal Protection violations under both the United States and Kansas Constitution, Due Process violations under both the United States and Kansas Constitution, violations of Title VI of the Civil Rights Act of 1964, as amended, violations of the Rehabilitation Act of 1973, and violations of Article VI, Section 6 of the Kansas Constitution. *Id.*

The State of Kansas moved to dismiss, asserting its Eleventh Amendment immunity, among other arguments. *Id.* Before the district court ruled on the State of Kansas' motion to dismiss, Respondents voluntarily moved to dismiss their causes of action arising under state law and filed a separate lawsuit in the Shawnee County (Kansas) District Court. In that state court litigation, Respondents asserted those state law claims that they moved to voluntarily have dismissed in the federal court litigation.

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[2] There are multiple Respondents to the Petition for Writ of Certiorari. Respondents filing this Brief in Opposition were the Plaintiffs below. The remaining Respondents were, except as noted above, *supra* n.1, defendants below. "Respondents" as used in this Brief in Opposition shall refer to Plaintiffs below. Where reference is made to other Respondents, they will be identified by name or by their party status in the litigation below.

Both the federal court litigation and the state court litigation proceeded simultaneously. In the federal court litigation, the State of Kansas appealed the district court's refusal to dismiss Respondents' causes of action. *See, Robinson v. State of Kansas*, 295 F.3d 1183 (10th Cir. 2002). The Tenth Circuit affirmed the district court's decision and remanded the matter back to the district court. *Id.* The district court, however, elected to hold the litigation in abeyance pending the disposition of Respondents' claims in state court.

Respondents tried their state court claims to the bench in September and October 2003. *Montoy v. State of Kansas*, Case No. 99 c 1738, 2003 WL 22902963 (Shawnee Cnty. Dist. Ct., Dec. 2, 2003). On December 2, 2003, the Shawnee County District Court issued its Memorandum Opinion and Preliminary Interim Order declaring that the State of Kansas' system of funding public education was unconstitutional in violation of the Equal Protection clauses of the United States and Kansas Constitution and Article VI, Section 6 of the Kansas Constitution.[3] *Id.*

Following the issuance of the state district court's opinion, a group called Kansans for Separation of School and State filed a motion to intervene with the state district court. The trial court denied the motion. Kansans for Separation of School and State appealed the state district court's denial of its motion to intervene. The Kansas Supreme Court affirmed the state district court's decision, holding that the state district court did not abuse its discretion in denying the motion to intervene because

[3] The Respondents did not bring any claims in state court alleging violations of the United States Constitution.

the movant's interests were adequately represented by the State of Kansas. *Montoy v. State of Kansas*, 102 P.3d 1158, 1160 (Kan. 2005) (***"Montoy II½"***).

The State of Kansas and the individual defendants named in their official capacity also appealed the state district court's decision directly to the Kansas Supreme Court.[4] On January 3, 2005, in a *per curiam* opinion, the Kansas Supreme Court reversed the Shawnee County District Court's holding that the State's public education funding scheme was unconstitutional in violation of the Equal Protection Clause. *Montoy v. State of Kansas*, 102 P.3d 1160, opinion supplemented, 120 P.3d 306 (Kan. 2005) (***"Montoy II"***). The Kansas Supreme Court affirmed the lower court's holding that the school funding scheme violated Article VI, Section 6 of the Kansas Constitution. *Montoy II*, 102 P.3d at 1163-65. Specifically, the court held:

> [S]tudent performance accreditation measures were utilized in 2001 when the legislature directed that a professional evaluation be performed to determine the costs of a suitable education for Kansas school children. In authorizing the study, the legislature defined "suitable education." [Citation omitted]. The Legislative Education Planning Committee (LEPC), to whom the task of overseeing the study was delegated, determined which performance measures would be utilized in determining if Kansas' school children were

[4] Following the decision of the state district court, the Kansas Legislature amended the Rules of Appellate Procedure to permit direct appeals to the Kansas Supreme Court when a statute is declared unconstitutional in violation of Article VI of the Kansas Constitution. See KAN. STAT. ANN. § 60-2102(b).

receiving a suitable education. The evaluation, performed by Augenblick & Myers, utilized the criteria established by the LEPC, and, in part, examined whether the current financing formula and funding levels were adequate for schools to meet accreditation standards and performance criteria. The study concluded that both the formula and funding levels were inadequate to provide what the legislature had defined as a suitable education.

Although in *Montoy I*, . . . we concluded that accreditation standards may not always adequately define a suitable education, our examination of the extensive record in this case leads us to conclude that we need look no further than the legislature's own definition of suitable education to determine that the standard is not being met under the current financing formula. Within that record there is substantial competent evidence, including the Augenblick & Myers study, establishing that a suitable education, as that term is defined by the legislature, is not being provided. In particular, the plaintiff school districts (Salina and Dodge City) established that the [funding formula] fails to provide adequate funding for a suitable education for students of their and other similarly situated districts, i.e., middle- and large-sized districts with a high proportion of minority and/or at-risk and special education students. Additional evidence of the inadequacy of the funding is found in the fact that, while the original intent of the provision for local option budgets within the financing formula was to fund "extra" expenses, some school districts have been forced to use local option budgets to finance general education.

> Furthermore, in determining if the legislature has made suitable provision for the finance of public education, there are other factors to be considered in addition to whether students are provided a suitable education. Specifically, the district court found that the financing formula was not based upon actual costs to educate children but was instead based on former spending levels and political compromise. This failure to do any cost analysis distorted the low enrollment, special education, vocational, bilingual education, and the at-risk student weighting factors [in the formula].
>
> Thus, there is substantial competent evidence to support the district court's findings discussed above. These findings are sufficient to support the conclusion that the legislature has failed to "make suitable provisions for finance" of the public school system as required by Art. 6, § 6 of the Kansas Constitution.

Montoy II, 102 P.3d at 1164-65.

The Kansas Supreme Court withheld issuing a final order, retained jurisdiction, and provided the State of Kansas the 2005 Legislative Session to remedy the constitutional defects in its system of funding public education. *Id.* at 1165. During the 2005 Legislative Session, the Kansas Legislature passed 2005 House Bill 2247 ("H.B. 2247"). *See, e.g.*, *Montoy v. State of Kansas*, 112 P.3d 923, 926 (Kan. 2005) ("***Montoy III***"). Governor Kathleen Sebelius allowed H.B. 2247 to become law without signing it. *Id.* On April 15, 2005, the Kansas Supreme Court issued a Show Cause Order, directing the parties to submit briefs to the court addressing whether

H.B. 2247 remedied the constitutional defects in the State's school funding scheme. *Id.*

On June 3, 2005, the Kansas Supreme Court issued its opinion in *Montoy III*. In that opinion, the court held that H.B. 2247 did not render the State's system of funding public education constitutional. The court concluded as follows:

> As of this time, the legislature has failed to provide suitable funding for a constitutionally adequate education. School districts have been forced to use the [Local Option Budget] to supplement the State's funding as they struggle to suitably finance a constitutionally adequate education, a burden which the constitution places on the State, not on local districts. The result is wealth-based disparity because the districts with lower property valuations and median incomes are unable to generate sufficient revenue. Because property values vary widely, a district's ability to raise money by the required mill levy also varies widely. The cost-of-living weighting and extraordinary declining enrollment provision[, which were new provisions added to the funding formula in H.B. 2247,] also have the potential to exacerbate inequity. A higher LOB cap, cost-of-living weighting, and the extraordinary declining enrollment provisions cannot be allowed to exacerbate inequities while we wait for the legislature to perform its constitutional duty.
>
> We conclude that, on the record before us, a continuing lack of constitutionally adequate funding together with the inequity-producing local property tax measures mean the school financing formula, as altered by H.B. 2247, still

> falls short of the standard set by Article 6, § 6 of the Kansas Constitution.

Montoy III, 112 P.3d at 937.

The court ordered the State of Kansas to provide additional funding for public education, and to equitably distribute the additional funding, by no later than July 1, 2005. *Id.* at 940. The court's specific order was as follows:

> Specifically, no later than July 1, 2005, for the 2005-06 school year, the legislature shall implement a minimum increase of $285 million above the funding level for the 2004-05 school year, which includes the $142 million presently contemplated in H.B. 2247. In deference to the cost study analysis mandated by the legislature in H.B. 2247, the implementation beyond the 2005-06 school year will be contingent upon the results of the study directed by H.B. 2247 and this opinion.

Id. The governor called the Kansas Legislature back for a special legislative session, during which legislation passed consistent with the Supreme Court's opinion. *Montoy v. State of Kansas*, 138 P.2d 755, 759-60 (Kan. 2006) ("***Montoy V***").

During the 2006 Legislative Session, the Kansas Legislature, having received and reviewed a new education cost study prepared by the State of Kansas Division of Legislative Post Audit, passed new school finance legislation – 2006 Senate Bill 549 ("S.B. 549"). Over the next three years, pursuant to S.B. 549, the State of Kansas will inject hundreds of millions of new dollars into public education. And much of that new money is specifically targeted to impact students with the greatest

educational need – minority students, special education students, students for whom English is not a native language, students from low socio-economic backgrounds. *See, e.g., Montoy V*, 138 P.3d at 760.

The parties below submitted briefs to the Kansas Supreme Court addressing the issue of whether S.B. 549 remedied the constitutional defects previously identified. On June 13, 2006, roughly one week prior to oral arguments in the Kansas Supreme Court, Petitioners filed a motion to intervene. The court denied Petitioners' motion on June 15, 2006. (*See* Petition for Writ of Certiorari, App. 1).

Petitioners submitted a nearly identical motion to intervene in the federal litigation. *Robinson v. State of Kansas*, Case No. 99-1193-MLB, Docket Entry #231 (D. Kan., June 21, 2006). The district court has not ruled on Petitioners' motion.

On July 28, 2006, the Kansas Supreme Court dismissed the litigation, holding that S.B. 549 so materially altered the school finance formula that served as a basis for Respondent's lawsuit that the matter could no longer be decided on the record on appeal available to the court. *Montoy V*, 138 P.3d at 765 ("[T]he school finance formula that was at issue in this case no longer exists. It has been replaced with a fundamentally different funding scheme for which there are no facts and figures in the record from which we could determine how it will operate over the next 3 years.") As a result of Respondents' efforts in state court, the State of Kansas has increased education funding by roughly $755 million per year, with a majority of that new funding being targeted to students who, like

the Respondents, are minority, of non-U.S. national origin, disabled, and/or from a low income household. *Id.*

The federal litigation remains active pending disposition of Respondents' motion to dismiss. *Robinson*, Docket Entry #245 (D. Kan., October 6, 2006).

X. REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. Petitioners Were Not Parties to the Litigation Below

Petitioners allege that they are entitled to party status in the litigation below because they are bound by the Kansas Supreme Court's decisions. (See, Petition for Writ of Certiorari, at 3, n.1). Specifically, Petitioners allege:

> [I]f petitioners are bound by the Kansas Supreme [C]ourt decisions, then they should be treated as a "party," not as strangers to the action, because they, in effect, are non-named class members whose interests were not adequately represented by the existing parties to the litigation and who timely objected to the arguments advanced by plaintiffs on their behalf at the earliest opportunity after they became aware of them. *Devlin v. Scardetti (sic)*, 536 U.S. 1 (2002) (holding that non-named class members were entitled to appeal without first intervening when petitioners' interests were not adequately represented by existing parties).

(Petition for Writ of Certiorari, at 3, n.1). Petitioners have misrepresented the nature of the litigation below and misinterpreted this Court's precedent.

"[O]nly parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (*per curiam*). Petitioners were not parties to the lawsuit below and, therefore, lack standing to appeal the Kansas Supreme Court's decisions.

Unlike in *Devlin*, the litigation below was not a class action. *Compare Montoy II*, 102 P.3d at 1160 (noting that plaintiffs were only two school districts and 36 individual students); *Devlin v. Scardaletti*, 536 U.S. 1, 3 (2002) (noting that the litigation below was a class action, certified pursuant to Fed. R. Civ. P. 23). Although, the actions of the Kansas Legislature taken as direct result of Respondents' state court litigation ultimately benefited all Kansas school children, Respondents never took on the burden of representing all Kansas school children. In fact, Respondents advanced many positions that were adverse to the interests of many school districts in the state. *See, e.g., Montoy III*, 112 P.3d 923, 934 (noting Respondents argued that increases in Local Option Budget authority increased inequities in the school funding formula; noting Respondents argued that the Low Enrollment Weighting, which provides additional funding to smaller school districts, exacerbated inequities in the school funding formula). Unlike the plaintiffs in *Devlin*, Respondents in the litigation below were not class representatives and were not advancing claims on behalf of all students in the state. The fact that the Kansas Legislature, prompted by Respondents' state court litigation, passed legislation benefiting all Kansas school children does not render Respondents' the class representatives for all Kansas school children and does not render the litigation below an uncertified class action.

In *Devlin*, this Court held that "[w]hat is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement." *Devlin*, 536 U.S. at 10. This Court further opined that "this feature ***of class litigation*** . . . requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing." *Id.* The litigation below was, unlike the litigation in *Devlin*, not a class action. Petitioners in the present case, unlike the Petitioners in *Devlin*, were not, therefore, unnamed class members. And unlike the litigation in *Devlin*, the litigation below did not involve objections made at a settlement fairness hearing. Petitioners' reliance on *Devlin* is misplaced. Petitioners were not parties to the litigation below and, therefore, have no standing to appeal from the Kansas Supreme Court's decision below.

B. Petitioners Present No Proper Federal Questions For This Court to Review

28 U.S.C. § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

In *Howell v. Mississippi*, 543 U.S. 440, 443 (2005), this Court, addressing the meaning of 28 U.S.C. § 1257(a) held:

> Congress has given this Court the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had ... where any ... right ... is specially set up or claimed under the Constitution or the treaties or statutes of ... the United States." [Citation and emphasis omitted]. Under that statute and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim "was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) (*per curiam*); see also *Illinois v. Gates*, 462 U.S. 213, 218, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (tracing this principle back to *Crowell v. Randell*, 10 Pet. 368, 392, 9 L.Ed. 458 (1836), and *Owings v. Norwood's Lessee*, 5 Cranch 344, 3 L.Ed. 120 (1809)).

In the litigation below, Respondents raised no federal claims, the Kansas Supreme Court addressed no federal claims, and no federal claims were decided by the Kansas Supreme Court. Thus, even if Petitioners could be considered "parties" to the litigation below, which they cannot, their Petition for Writ of Certiorari should still be denied because Petitioners present no proper federal questions for this Court to review.

XI. CONCLUSION

Respondents respectfully request that the Petition for Writ of Certiorari be DENIED because Petitioners were

not parties to the litigation below and because the Kansas Supreme Court addressed no federal claims in the litigation below.

Respectfully submitted,

ALAN L. RUPE
Counsel of Record
KUTAK ROCK LLP
8301 E. 21st St. N.
Suite 370
Wichita, Kansas 67206
(316) 609-7900

JOHN S. ROBB
SOMERS, ROBB & ROBB
110 East Broadway
P.O. Box 544
Newton, Kansas 67114
(316) 283-4560

Attorney for Respondents
(Plaintiffs Below)